IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision :August 03, 2007

CM(M) No.1934/2006

Smt.Shakuntala Devi ..... PETITIONER
! Through: Mr.Pankaj Gupta, Advocate

Vs.

$ Shri Ram Lal ..... RESPONDENT
^ Through : Mr.R.K.Shukla, Advocate

CORAM :-
*** HON'BLE MR. JUSTICE ANIL KUMAR**

1. Whether reporters of Local papers may be allowed to see the judgment? YES
2. To be referred to the reporter or not ? NO
3. Whether the judgment should be reported in the Digest? NO

ANIL KUMAR, J. (Oral)

1. The petitioner has impugned the order dated 16th October, 2006 passed by Additional Rent Control Tribunal allowing the appeal of the respondent tenant holding that the rate of rent of the premises is Rs.400 per month exclusive of electricity charges and after the notice of increment, the rent is Rs.440/- per month and directing the respondent to deposit the arrears of rent, if any, within one month from that day. The appeal before the Additional Rent Control Tribunal was filed by the respondent/tenant against

the order dated 18th November, 2004 of the Controller in eviction petition bearing No.E-124 of 2000 directing the respondent to pay arrears of rent with effect from August 1997 at the rate of Rs.3,000/- per month and revised rate of rent with effect from 1st August, 1999 at the rate of Rs.3,300/- per month.

2. The petitioner had filed an eviction petition under Section 14(1)(a) of Delhi rent Control Act, 1959 against the respondent in respect of shop measuring 7' x 8' forming part of the residential property bearing No.L-58, Near Vijay Chowk, Near Laxmi Nagar, Delhi. The petitioner had alleged that a notice of demand dated 5th July, 1999 was sent to the respondent claiming arrears of rent claiming that respondent is a chronic defaulter and has not tendered or paid the rent with effect from 1st December, 1996 at the rate of Rs.3,000/- per month and to increase the rent in compliance of Section 6(A) of Delhi Rent Control Act, 1958 pursuant to the notice served on the respondent.

3. The notice was replied by the respondent by reply dated 14th July, 1999 contending specifically that he is a tenant at the rate of Rs.400/- per month. In the premises demised, he is carrying on business of sale and repair of watches. The respondent categorically contended that since very

inception, no rent receipts were issued to him and he had been paying the rent at the rate of Rs.400/- per month. It was contended that the rent has been received up to the month of May 1999 and since the petitioner failed to accept the rent from June and July, the rent was sent by money order on 3rd July, 1999 and the allegation that the rent was due from 1st December, 1996 is incorrect. The petitioner thereafter filed the eviction petition dated 1st July, 2000.

4. The petitioner categorically contended that whenever the rent was paid to her she recorded the same in a diary which was maintained by her and, therefore, no separate rent receipts were issued by her. The Additional Rent Controller, however, by order dated 18th November, 2004 allowed the petition holding that the respondent is in arrears of rent with effect from August 1997 and directed the respondent to pay or deposit arrears of rent at the rate of Rs.3000/- per month from August 1997 and at the rate of Rs.3,300/- per month from 1st September, 1999 onwards.

5. The respondent challenged the order of the Additional Rent Controller in an appeal which was allowed by Additional Rent Control Tribunal, Shri S.M. Chopra, by his order dated 28th January, 2005 holding that the finding of

the Controller that the rate of rent is Rs.3,000/- is against the evidence on record and held that considering the small size of shop, the rate of rent is Rs.400/- per month. The petitioner challenged the order dated 28th January, 2005 passed by the Additional Rent Control Tribunal by filing a petition being CM(M) No.363 of 2005 under Article 227 of the Constitution of India. The petition filed by the petitioner under Article 227 of the Constitution of India was allowed by this Court by order dated 13th July, 2006 and this Court directed the Tribunal to decide the appeal in accordance with law in view of the observation made in the order. This Court had relied on Santosh Hazari Vs. Purushottam Tiwari, 2000(1) SCC 179. This court had held that the Tribunal had simply brushed aside the testimony of three witnesses though the same is the primary evidence available in the present case regarding the rate of rent.

6. After remanding the matter to the Tribunal, the same was heard by Shri M.C. Garg, another Additional Rent Control Tribunal, who has also held the rate of rent payable by the respondent to the petitioner was Rs.400/- per month and after 1st September, 1996 the rent payable to the petitioner is Rs.440/- per month.

7. The order of the Additional Rent Control Tribunal again holding after the matter was remanded to the Tribunal that the rate of rent is Rs.400/- per month till August 1999 and after that Rs.440/- per month, is challenged in the present petition on the ground that no reasons have been disclosed by the Tribunal except reproducing the oral testimony of the witnesses.

8. Learned counsel for the petitioner has very vehemently contended that the finding of rate of rent given by the Controller is a finding of fact which could not be interfered with by the Tribunal. According to the petitioner, contradictions in the testimonies of the witnesses of the petitioner and the attorney of the petitioner is not sufficient to reach a finding as has been given by the Tribunal.

9. I have heard the parties at length and have also perused the record of lower courts. The Rent Control Tribunal has considered the testimonies of the attorney of the petitioner who has contended that the shop was let out to the respondent on 1st October, 1996 in the presence of Shri Deep Chand, Shri S.P. Chawla and Shri J.N. Kapoor. This was objected to by the respondent on the ground that it was beyond pleadings as it was not pleaded in the petition that the premises was let out in presence of these witnesses.

The attorney of the petitioner also deposed that the respondent had paid Rs.3,000/- as advance rent for the month of October 1996. In the cross-examination, the attorney of the petitioner categorically contended that in the record of the house tax, the rate of rent has been shown as Rs.3000/- per month and that he has not produced the relevant record.

10. The testimony of AW2, Shri Deep Chand, has also been noticed by the Tribunal who had deposed that the premises under the tenancy of the respondent was let out on 1st October, 1995. He also deposed that in 1994, 1995 the prevailing market rate of rent was Rs.3,000/- per month. According to him, the present rate is about Rs.3,600/- to Rs.4,000/- per month. The said witness, Shri Deep Chand, categorically contended that there is another shop under the tenancy of Shri Vinod Pandey of the same size which is a part of the same property which has been let out by Shri Vinod Pandey after purchasing it from the petitioner at a monthly rent of Rs.3,000/- to Mohd. Ilyas Master son of Master Sattar on 1st March, 2002 by a lease deed duly registered before the Sub-Registrar of Delhi. According to him, this fact could be verified from Mohd. Ilyas or Shri Vinod Pandey. He admitted that the amount of Rs.3,000/- was not given in his presence by respondent to the petitioner and he categorically stated that he noted the date as 1st October,

1995 in his diary though no diary was produced by him. He categorically contended that the amount of Rs.3000 was not paid in his presence.

11. The Tribunal has also considered the testimony of Shri S.P. Chawla, AW3, who stated that he remembered the date of tenancy on his own and that one/half of the property where the premises in dispute is located has been purchased by him from the petitioner. After considering the testimony of the attorney of the petitioner, Shri Deep Chand and Shri S.P. Chawla, the Tribunal has noted that the attorney of the petitioner had stated that the premises was let out four years prior to institution of petition which was filed in 2000 and therefore, the attorney of the petitioner deposed that the premises was let out in 1996 whereas the witnesses, Deep Chand and S.P. Chawla, deposed that the premises was let out on 1st October, 1995. The Tribunal has considered the difference in the date of letting deposed by witnesses and by the attorney of the petitioner and relied on it in disbelieving them because the witness was categorical that he had noted the date of letting in his diary as 1995. If the witness had noted the date in his diary, then the probability is that he would not make a mistake about the year of letting. The Tribunal has also considered the photocopy of the lease deed of Shri Vinod Pandey to his tenant which tenancy was created in 2002 and has held

that the prevalent market rent of 2002 will not be relevant for considering and interfering as to what was the rent at which the premises was let out in 1996 by the petitioner to the respondent. As far as the letting of premises by Vind Pandey to his tenant in order to show what was the market rent in 2002, neither Vinod Pandey had been produced by the petitioner nor the tenant of Vinod Pandey, which fact has been considered by the Tribunal now. The Tribunal has also noted that no evidence was produced by the landlady that she had spent Rs.35,000/- so that it could be inferred that the rate of rent of the premises in dispute was higher than the ordinary market rent.

12. The Tribunal has also considered the fact that land lady who had let out the premises did not appear in the witness box. The Tribunal has also considered the fact that though in reply to notice the respondent categorically contended that the rate of rent was Rs.400/- per month, however, in the petition it was not disclosed by the petitioner that the premises was let out by her in presence of Shri Deep Chand and Shri S.P. Chawla and this fact was objected to on behalf of respondent when the attorney of the petitioner deposed about it. The petitioner/landlady though categorically pleaded that she had been maintaining a diary where she had been writing the rent received from the respondent, however, the diary was not produced.

13. The attorney of the petitioner also stated that the rent has been shown as Rs.3,000/- per month in the record of Municipal Corporation of Delhi but the same was not produced. In Habeeb Khan and others Vs. Valusula Devi & Others, AIR 1997 Andhra Pradesh 53, it was held that it is not a sound practice for those desiring to rely upon a certain set of facts, to withhold from court the best evidence which is in their possession which could throw light upon controversies and the fact of withholding the evidence, which have been available to a party, is that adverse inference should be drawn from withholding the same which judgment was also noted and relied on by the Tribunal. Since the petitioner failed to produce the record of the house tax, which according to the petitioner shows that the rate of rent is Rs.3000 per month and the diary maintained by her, the adverse inference should be taken against her. Learned counsel for the petitioner has relied on 131 (2006) DLT 332, Raj Rani Vs. Lekh Raj where it was held that the Tribunal in that case had erroneously exercised jurisdiction while seeking to rely upon documents, which was MCD record, which was rightly ignored by the Trial Court. In this case, the disputes between the parties was as to what was the agreed rate of rent for one room. The land lord had contended that the premises was let out at Rs.500/- per month, however, the tenant relied on the survey conducted by

the Municipal Corporation of Delhi where the rate of rent was given as Rs.80/-per month. This document was not produced by the respondent at the stage of evidence and nor the keeper of this was produced and the document was produced by the respondent only at the time of cross-examination of the landlord and the landlord in that case had denied the knowledge of this document. In these circumstances, the Tribunal had held that survey record of the Municipal Corporation of Delhi which was not produced at the time of evidence but was produced only to contradict the landlord and the record keeper of the Municipal Corporation of Delhi was not produced, therefore, the same could not be relied on. The case of the petitioner is apparently distinguishable. In Ambica Quarry Works v. State of Gujarat and Ors. MANU/SC/0049/1986 the Supreme Court observed:-

> "The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

Similarly in Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59), the Supreme observed:-

> "It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

As held in Bharat Petroleum Corporation Ltd and Anr. v. N.R.Vairamani and Anr. (AIR 2004 SC 778), a decision cannot be relied on without disclosing the factual situation. In the same judgment the Supreme Court also observed:-

> " Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. In the Raj Rani (supra) the tenant had produced the copy of survey report in the cross examination and not examined the person who had carried out the survey and it was therefore, not relied on whereas in the case of petitioner, it is her

case that rent of the premises has been shown as Rs.3000 per month in the record of the House Tax Department and yet she did not produce the same. It is the case of the attorney of the petitioner who has deposed on oath that the rate of rent as has been shown by the Municipal Corporation of Delhi also is Rs.3,000/- per month in the survey conducted by the Municipal Corporation of Delhi. If the petitioner relies on a document and it is not produced, the inevitable inference is that the petitioner has tried to withhold a very relevant evidence which should have been produced by the petitioner. The finding of the Tribunal, therefore, on the ground as has been alleged by the learned counsel for the petitioner can not be faulted. The other evidence of the petitioner which could be produced by her, is her own diary in which it is stated in the pleadings that she was maintaining and writing the rent paid by the respondent.

14. In the facts and circumstances, it cannot be held that the Rent Control Tribunal has not considered the evidence of the petitioner's attorney and her witnesses and has not given any reasoning and has only reproduced the testimonies of the attorney and two other witnesses by the petitioner and has come to a wrong finding ex facie.

15. It is also no more res integra that while reversing a judgment or order of the trial Court, Appellate court must remain conscious of two principles, particularly on the finding of the facts which are based on conflicting evidence. Firstly the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence. The observation of the Supreme Court in Santosh Hazari Vs Purushottam Tiwar, (2001) 3 SCC, 179 are as under:-

> 15. ……..First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for re-hearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. The task of an appellate court affirming the findings of the trial court is an easier one. The appellate court agreeing with the view of the trial court need not restate the effect of the evidence or reiterate the reasons given by the trial court; expression of general agreement with reasons given by the court, decision of which is under appeal, would ordinarily suffice (See *Girijanandini Devi* v. *Bijendra Narain Choudhary, AIR 1967 SC 1124*). We would, however, like to sound a note of caution. Expression of general agreement with the findings recorded in the judgment under appeal should not be a device or camouflage adopted by the appellate court for shirking the duty cast on it. While writing a judgment of reversal the appellate court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial court must weigh with the appellate court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. **This certainly does not mean that when an appeal lies on facts, the appellate court is not competent to reverse a finding of fact arrived at by the**

> **trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate court is entitled to interfere with the finding of fact.** (See *Madhusudan Das* v. *Narayanibai,(1983) 1 SCC 35*). The rule is — and it is nothing more than a rule of practice — that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice or there is a sufficient balance of improbability to displace his opinion as to where the credibility lie, the appellate court should not interfere with the finding of the trial Judge on a question of fact. (See *Sarju Pershad Ramdeo Sahu* v. *Jwaleshwari Pratap Narain Singh* 10) Secondly, while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it. We need only remind the first appellate courts of the additional obligation cast on them by the scheme of the present Section 100 substituted in the Code. The first appellate court continues, as before, to be a final court of facts; pure findings of fact remain immune from challenge before the High Court in second appeal. Now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on questions of law unless such question of law be a substantial one.

16. In the circumstances, it cannot be held that finding of fact arrived at by the Controller could not be upset by the appellate Tribunal, as the fact of non-production of the municipal record which according to petitioner herself

recorded that the rent was Rs.3,000/- which was not produced nor the petitioner has produced her diary showing that the rate of rent was Rs.3,000/- per month. The appellate court has also considered the discrepancies in the testimonies of the witnesses. On the basis of the entry made by Shri Deep Chand in his diary he contended that the premises was let out in October 1995 whereas the attorney of the petitioner stated that the premises was let out in October, 1996 and therefore, the discrepancies between the statements of two was not irrelevant.

17. Learned counsel for the petitioner has also relied on AIR 1996 Madhya Pradesh 247, Kashi Ram Vs. State of Madhya Pradesh & Others to contend that the oral evidence is primary evidence and khasra entries have presumptive value. It cannot be disputed that oral evidence, in the facts and circumstances, is the primary evidence as there is no written evidence as not rent note or rent receipt has been produced to show as to what was the rate of rent and the record of the Municipal Corporation and her own diary has not been produced by her. The oral testimony has been considered as a primary evidence by the appellate Tribunal and, therefore, the finding of the appellate Tribunal cannot be impugned on the ground as has been alleged by the petitioner.

18. This is also no more res integra that to be amenable to correction by the High Court, the error committed by the court or authority on whose judgment the High court was exercising jurisdiction, should be an error which is self-evident. The error which needs to be established by lengthy and complicated arguments or by indulging into a long drawn process of reasoning cannot possibly be an error available for correction by writ of certiorari or Article 227 of the Constitution of India. If it is reasonably possible to form two opinions on the same material, the finding arrived at one way or other way cannot be called a patent error. In Surya Dev Rai vs. Ram Chander Rai, (2003) 6 SCC 675, it was held by the Apex Court that the jurisdiction under Article 226 was not available to be exercised for indulging into re-appreciation or evaluation of finding or correcting errors in drawing inference like a court of appeal.

19. An error which is self-evident can be correct but if two views are possible then finding arrived at one way or the other cannot be called patent error and cannot be corrected by exercising jurisdiction under Article 227 of the Constitution of India.

20. For the foregoing reasons, I do not find any patent illegality or error apparent in the order of the Tribunal holding the rate of rent was Rs.400/- per month in 1996 and Rs.440/- per month from 1st September, 1999. There are no ground to interference under Article 227 of the constitution of India and the petition is, therefore, dismissed.

August 03, 2007 **ANIL KUMAR, J.**
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